Amarjit Singh a/l Kartar Singh v Kung Boon Chin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–1285 OF 2006
MARY LIM JC
12 FEBRUARY 2010

Contract — Agreement — Share sale agreement — Conditional or contingent agreement — Conditions precedent stipulated — Rights of parties — Whether agreement suspended until conditions identified satisfied — Whether compliance absolutely vital — Whether non-compliance rendered agreement void and liable to termination

Contract — Time — Share sale agreement — To procure security clearance — Whether within stipulated time — Whether essence of contract — Whether complied — Whether plaintiff waived or allowed extension of time — Whether termination carried out promptly

Legal Profession — Solicitors — Stakeholders — Share sale agreement — Solicitor holding 10% of purchase price — Money to release upon fulfillment of conditions precedent — Whether released monies to first and third defendants upon fulfillment of conditions precedent — Whether solicitor breached its duties as stakeholder

The plaintiff and the first to third defendants entered into an agreement for the purchase of the defendants' shares in a company known as JKL Security Sdn Bhd, a company that specialised in the provision of security guards for RM1.3m ('share sale agreement'). The plaintiff paid to the defendants a sum of RM65,000 representing 5% of the total consideration as earnest deposit. Subsequently, the plaintiff paid a sum of RM130,000 being 10% of the purchase price. This sum was paid to the fourth defendant, the solicitors for the first to third defendants', who were to hold as stakeholders for the onward release to the first to third defendants upon fulfillment of the conditions precedent stipulated at cl 5.1(a) and (b) of the agreement. Upon the fulfillment of the conditions precedent, the plaintiff was to pay the balance 85% of the purchase consideration to the fourth defendant within one month of that fulfillment. Pursuant to cl 5.2, the parties agreed that the conditions precedent were to be fulfilled within eight months from the date of the share sale agreement namely, by 13 January 2006. As there was non-fulfillment of the conditions precedent within the aforesaid time, the

plaintiff terminated the share sale agreement and required a refund of all monies previously paid. The 5% earnest money was returned to the plaintiff but the fourth defendant, who viewed that the first to third defendants had fulfilled their obligations, released the balance to the first to third defendants. The issues before the court were as follows: (a) whether the conditions precedent in cl 5.1 had been fulfilled; and (b) whether the fourth defendant breached its duties as stakeholders in releasing to the first to third defendants monies that it held as stakeholder.

Held, allowing the plaintiff's claim with costs:

(1) In a contingent contract, the rights of the parties are suspended until the conditions identified are satisfied and the agreement can then be completed. So, unless and until the conditions have been fulfilled, the share sale agreement did not take effect (see para 12).

(2) On a proper reading of cl 5.1, the obligation to procure the necessary approvals lies with the defendants. Clause 5.1(a)(ii) plainly provides that the defendants are to 'apply and obtain the relevant approvals'. It would be fair to say that this obligation would include attending to any logistical arrangement in order that the plaintiff may undergo the security clearance required. The condition precedent in cl 5.1(a)(ii) above had not been fulfilled. It was also clear from cl 5.2 that all three conditions precedent must be satisfied and not just one or two of the three conditions precedent (see paras 18–19).

(3) There was no agreement to an extension of time by the plaintiff to allow the first to third defendants to comply with cl 5.1. This was significant, as by virtue cl 14.3, the parties had intended that time was to be the essence of the agreement. Consistent with this intention, the parties had provided that the conditions precedent had to be fulfilled within eight months from the date of agreement namely, by 13 January 2006 (see para 21).

(4) There was no room for suggesting that the conditions precedent may be fulfilled by a time other than the date fixed. The compliance requirements were strict on both parties. Until the conditions had been satisfied, there would be no sale to be completed and the rights of the parties were suspended in the meantime. The plaintiff was therefore perfectly within its rights when it terminated the share sale agreement in the manner that it did and the plaintiff was further entitled to demand a refund of the deposit held (see paras 27 & 29).

(5) The fourth defendant was confused of the two roles he played namely, as solicitor and stakeholder. In looking to 'his client's interests', he had clearly forgotten his other principal, the plaintiff of whose consent he

was to obtain and whose interests he was also to safeguard. From the exchange of correspondence and the evidence adduced, it was evident that the fourth defendant was in breach of its duties as stakeholder when it released the deposit to the first to third defendants (see para 39).

[Bahasa Malaysia summary

Plaintif dan defendan-defendan pertama hingga ketiga menandatangani perjanjian untuk membeli saham defendan-defendan di dalam syarikat yang dikenali sebagai JKL Security Sdn Bhd, sebuah syarikat yang mengkhusus dalam memperuntukkan pengawal-pengawal keselamatan, dengan harga RM1.3 juta ('perjanjian jualan saham'). Plaintif membayar kepada defendan-defendan sejumlah RM65,000 iaitu 5% daripada jumlah keseluruhan sebagai deposit untuk jaminan perjanjian tersebut. Kemudian, plaintif membayar sejumlah RM130,000 sebagai 10% daripada harga belian tersebut. Wang tersebut dibayar kepada defendan keempat, peguam cara defendan-defendan pertama hingga ketiga, sebagai pemegang akujanji untuk dilepaskan kepada defendan-defendan pertama hingga ketiga setelah syarat-syarat yang dinyatakan dalam klausa 5.1(a) dan (b) perjanjian tersebut dipenuhi. Sesudah memenuhi syarat-syarat terdahulu tersebut, plaintif perlu membayar baki 85% harga belian kepada defendan keempat dalam masa sebulan setelah syarat tersebut dipenuhi. Berikutan klausa 5.25, pihak-pihak bersetuju bahawa syarat-syarat terdahulu harus dipenuhi dalam masa lapan bulan dari tarikh perjanjian jualan saham tersebut, iaitu 13 Januari 2006. Disebabkan syarat-syarat terdahulu tersebut tidak dipenuhi dalam tempoh masa yang ditetapkan, plaintif menamatkan perjanjian jualan saham tersebut dan meminta pemulangan semua wang yang telah dibayar. Wang sebanyak 5% sebagai jaminan tersebut dipulangkan kepada plaintif, tetapi defendan keempat, yang berpendapat bahawa defendan-defendan pertama hingga ketiga telah memenuhi kewajipan mereka, menyerahkan baki tersebut kepada defendan-defendan pertama hingga ketiga. Isu-isu di hadapan mahkamah adalah: (a) sama ada syarat-syarat terdahulu dalam klausa 5.1 telah dipenuhi; dan (b) sama ada defendan keempat melanggar kewajipannya sebagai pemegang akujanji apabila memberikan wang yang dipegangnya kepada defendan-defendan pertama hingga ketiga.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dalam kontrak yang bergantung kepada sesuatu, hak-hak pihak tertangguh sehinggalah syarat-syarat yang telah ditetapkan dipenuhi dan perjanjian itu boleh disempurnakan. Maka, melainkan sehingga syarat-syarat tersebut dipenuhi, perjanjian jualan saham tersebut tidak akan sempurna (lihat perenggan 12).

(2) Pembacaan teliti klausa 5.1 menunjukkan bahawa kewajipan untuk mendapatkan kelulusan yang berkaitan terletak kepada defendan-defendan. Klausa 5.1(a)(ii) jelas memperuntukkan bahawa defendan-defendan harus 'apply and obtain the relevant approvals'. Adalah berpatutan untuk menyatakan bahawa tanggungjawab ini termasuklah menguruskan persiapan logistik agar plaintif dapat melepasi pelepasan keselamatan yang diperlukan. Syarat terdahulu dalam klausa 5.1(a)(ii) tidak dipenuhi. Adalah jelas daripada klausa 5.2 bahawa ketiga-tiga syarat terdahulu mestilah dipenuhi dan bukannya satu atau dua daripada tiga syarat-syarat terdahulu tersebut (lihat perenggan 18–19).

(3) Tidak ada perjanjian untuk lanjutan masa oleh plaintif untuk membenarkan defendan-defendan pertama hingga ketiga untuk mematuhi klausa 5.1. Ini adalah penting, kerana disebabkan oleh klausa 14.3, pihak-pihak telah meniatkan bahawa masa adalah inti pati perjanjian tersebut. Konsisten dengan niat ini, pihak-pihak telah memperuntukkan bahawa syarat-syarat terdahulu perlu dipenuhi dalam tempoh lapan bulan dari tarikh perjanjian iaitu sebelum 13 Januari 2006 (lihat perenggan 21).

(4) Tidak ada ruang untuk menyarankan bahawa syarat-syarat terdahulu mungkin dipenuhi dalam suatu masa yang lain daripada yang telah ditetapkan. Keperluan kepatuhan adalah tegas terhadap kedua-dua pihak. Sehingga syarat-syarat dipenuhi, tidak ada jualan untuk diselesaikan dan hak pihak-pihak sementara itu digantung. Plaintif oleh itu dengan sempurnanya berada dalam rangkuman hak-haknya apabila ia menamatkan perjanjian jualan saham secara yang dibuatnya dan plaintif juga selanjutnya berhak untuk menuntut pemulangan deposit yang dipegang (lihat perenggan 27–29).

(5) Defendan keempat keliru mengenai dua peranan yang dipegangnya, iaitu, sebagai peguamcara dan pemegang akujanji. Melihat kepada 'his client's interests', dia telah jelas terlupa prinsipal yang seorang lagi, plaintif, yang persetujuannya perlu diperoleh dan kepentingannya juga perlu dilindungi. Daripada surat menyurat dan keterangan yang dikemukakan, adalah jelas bahawa defendan keempat telah melanggar kewajipannya sebagai pemegang akujanji apabila ia melepaskan deposit kepada defendan-defendan pertama hingga ketiga (lihat perenggan 39).]

Notes

For a case on stakeholders, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2110.

For cases on agreement in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2466–2492.

For cases on time in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5488–5517.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (folld)
Annamalai a/l Subramaniam v V Muthusamy & Tan (sued as Firm) [2000] 7 MLJ 541, HC (refd)
Chen, Leong & Company (sued as Firm) v Sri Naka Jaya Enterprise Sdn Bhd [2009] MLJU 338; [2009] 6 CLJ 444, CA (refd)
Chin Kim & Anor v Loh Boon Siew [1970] 1 MLJ 197, FC (refd)
FACB Bhd v Ho See Sin & Ors [2003] 4 CLJ 667, HC (refd)
Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152, CA (refd)
Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, SC (refd)
National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)
OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134, CA (refd)
Ooi Boon Leong & Ors v Citibank NA [1984] 1 MLJ 222, PC (refd)
Potters (a Firm) v Loppert [1973] 1 All ER 658, Ch D (refd)
Samat Din & Partners v Bank Pembangunan (M) Bhd [1997] 3 MLJ 542, CA (folld)
Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah [2009] 1 MLJ 794; [2009] 1 CLJ 872, FC (folld)
Sorrel & Anor v Finch [1977] AC 728, HL (refd)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (folld)

Legislation referred to

Contracts Act 1950 ss 32, 36, 36(1), 40, 56
Rules of the High Court 1980 O 15 rr 1(2), 15

Saranjit Singh (Saranjit Singh) for the plaintiff.
T Thiyageswaran (Thiyages Pauline Ng & Co) for the defendants.

Mary Lim JC:

[1] There are two parts to this claim. The first being a claim against the first three defendants for refund of deposit on the basis of wrongful termination and forfeiture while the second is a claim against the fourth defendant for money had and received as a result of breach of duties as stakeholder.

[2] On the first day of trial, this court was informed that the third defendant had passed away 30 January 2007. This court was also informed

that no personal representatives have to date been appointed to represent the estate of the third defendant. Pursuant to an application by the plaintiff under O 15 r 15 of the Rules of the High Court 1980, I directed that the trial proceeded forthwith and dispensed with the requirement of notice under O 15 r 1(2).

THE FACTS

[3] These are the undisputed facts. The plaintiff and the first to third defendants entered into an agreement dated 13 May 2005 where the plaintiff agreed to purchase these defendants' shares in a company known as JKL Security Sdn Bhd, a company that specialised in the provision of security guards for RM1.3m (share sale agreement). The plaintiff paid RM65,000 representing 5% of the total consideration as earnest deposit. This money was paid directly to these defendants. The plaintiff later paid a sum of RM130,000 being 10% of the purchase price. This time the sum was paid to the fourth defendant, the first to third defendants' solicitors, who were to hold as stakeholders for the onward release to the first to third defendants upon fulfillment of the conditions precedent stipulated at cl 5.1(a) and (b) of the agreement. When there is fulfillment of the conditions precedent, the plaintiff was to pay the balance 85% of the purchase consideration to the fourth defendant within one month of that fulfillment.

[4] Pursuant to cl 5.2, the parties agreed that the conditions precedent are to be fulfilled within eight months from the date of the share sale agreement, that is by 13 January 2006.

[5] By letter dated 6 December 2005, the plaintiff's solicitors wrote to the fourth defendant inquiring whether its 'clients had fulfilled the conditions precedent as the due date will fall on 13 January 2006'. There was no reply till 24 January 2006 when the fourth defendant replied that 'the vendors have obtained verbal approval from Kementerian Keselamatan Dalam Negeri'. In the same letter, an extension of two months 'for the fulfillment of the conditions precedent' was sought. The next day, the fourth defendant faxed a letter enclosing KKDN's letter of approval. In that same letter, it was indicated that the defendants were 'currently in the midst of attending to all the relevant documents required to be released to the purchaser pursuant to cl 6.2'. This letter was replaced the following day, 26 January 2006, by a similar letter. In this second letter, the same KKDN's letter of approval was also enclosed.

[6] Meanwhile, the plaintiff's solicitors issued a notice of termination of the share sale agreement on 26 January 2006. In that notice sent to the fourth defendant, the plaintiff's solicitors informed that by reason of the

non-fulfillment of the conditions precedent within the time stipulated in cl 5.2, the plaintiff was terminating the share sale agreement and required a refund of all monies previously paid.

[7] Ten days later, on 6 February 2006, the first to third defendants being of the view that the conditions precedent had been fulfilled in time, demanded that the plaintiff settle the balance purchase price of RM1,105,000 on or before 24 February 2006, failing which pursuant to cl 12.1 of the share sale agreement, specific performance will be sought and the deposit of RM130,000 would be forfeited absolutely. This was disputed by the plaintiff who by letter dated 17 February 2006 again demanded a refund of the sum of RM195,000. Following this letter, the 5% earnest money was returned to the plaintiff but the fourth defendant, deciding that the first to third defendants had fulfilled their obligations, released the balance to the first to third defendants.

ISSUES

[8] The parties have identified four issues for consideration, three of which relate to the conditions precedent while the fourth relate to the position of the fourth defendant as stakeholder. Having heard the evidence and the submissions and in view of the pleadings, these issues may be consolidated as follows:

(a) whether the conditions precedent in cl 5.1 have been fulfilled; and

(b) whether the fourth defendant breached its duties as stakeholders in releasing to the first to third defendants monies that it held as stakeholder.

FINDINGS

Whether the conditions precedent in cl 5.1 have been fulfilled

[9] It is settled law that parties are free to contract and write the terms of their contract unless expressly prohibited by statute or common law — see *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222. From the terms and conditions in this share sale agreement, it is apparent that much of what has been provided accords with the general principles of contract found under both common law and statute. This will become clearer as the relevant terms are examined.

[10] Looking at the share sale agreement, it is without doubt a conditional or contingent agreement. This is evident from a reading of cl 5.1(a) where

three conditions precedent are prescribed. It would be useful to set out in full cl 5.1:

5.1 *Conditions Precedent*

(a) The sale and purchase of the said Shares shall be conditional upon the fulfillment or satisfaction of the following conditions precedent (hereinafter referred to as 'the Conditions precedent'):

(i) The Vendors shall apply and procure a renewed valid Company's licence to operate the said Business for the year 2005 from the Kementerian Keselamatan Dalam Negeri (hereinafter referred to as 'the KKDN');

(ii) The Vendors shall apply and obtain the relevant approvals from the KKDN, which may be necessary for the proposed sale and transfer of the said Shares by the Shareholders to the Purchaser PROVIDED ALWAYS that the relevant approvals shall specify a maximum of ONLY THIRTY per centum (30%) Bumiputra shareholding in the Company; and

(iii) The Vendors shall apply and procure renewals of all immigration visas/permits and other licenses/permits related to the business of the Company that may be expiring before the Completion Date (if applicable and necessary) to operate the said Business for the year 2005 from the relevant authorities

(b) The Vendors shall submit all applications pursuant to Clause 5.1 (a)(i), (ii) and (iii) above within THIRTY (30) days from the date of this Agreement.

(c) All references to the Conditions Precedent herein wherever mentioned shall mean all the approvals referred to in Clause 5.1 above (or the remaining approvals thereof if any of the approvals are waived by the agreements of the parties hereto).

[11] Before proceeding further, there is a small matter that needs to be addressed. I observed that although these three conditions refer to business licences, approvals for the proposed sale and transfer of shares, and immigration visas, permits or other licences or permits related to the business of JKL Security Sdn Bhd, all these references in fact refer to the 'approvals' envisaged in cl 5.1. This can be seen from a reading of cl 5.1(c).

[12] In a contingent contract, the rights of the parties are suspended until the conditions identified are satisfied and the agreement can then be completed — see *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211. So, unless and until the conditions have been

fulfilled, the share sale agreement does not take effect — *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152.

[13] Mr Thiyageswaran, learned counsel for the defendants, submitted that in compliance with the terms of the share sale agreement, all the stipulated conditions precedent had been fulfilled by 26 January 2006. This is how he put forward the proposition. Taking the conditions precedent at cl 5.1(a)(i) and (iii) first, it was the defendants' case that the condition precedent at cl 5.1(a)(i) was fulfilled because the defendants were already in possession of a valid licence at the material time. Encik Jaafar Sidek bin Mohd Piah (DW1) the second defendant, testified that the plaintiff would be aware of this since a copy of this licence can be found in the profile of JKL Security given to the plaintiff during the due diligence exercise. DW1 testified that a copy of a company's profile is normally sighted when purchasing a company and the current purchase is no exception. In relation to the second condition precedent at cl 5.1(a)(iii) which pertains to procuring renewals of immigration visas or permits, the defendants submitted that this did not apply because the defendants did not employ any foreign employees.

[14] So, as far as the defendants were concerned, the only condition precedent outstanding was that in cl 5.1(a)(ii) and even for this, that condition was said to have been satisfied in two respects. First, the defendants had obtained the necessary approval as apparent from KKDN's letter dated 25 January 2006 (p 29 or 31 as the same letter was sent twice). Even if the approval was a conditional approval, such approval was still within the meaning of cl 5.1(a)(ii) as the defendants had done all that was expected of them. It was entirely the obligation of the plaintiff to satisfy the conditional approval granted by KKDN. Second, where time is of the essence of the contract, termination has to be carried out promptly. Where it was not, the defendants were entitled to assume that time was now at large and to proceed to perform their obligations under the agreement within reasonable time, which the defendants say they did in the facts of this case. Since the share sale agreement could only be validly terminated by written notice, the plaintiff must be taken to have acquiesced to the continuance of time for performance with regard this approval as at the time the defendants informed the plaintiff of KKDN's approval, there was no notice of termination from the plaintiff. This accords with the defendants' reading of s 40 of the Contracts Act 1950. The defendants' letter of 26 January 2006 was received by the plaintiff in the morning of 26 January 2006 while the plaintiff's notice of termination also dated 26 January 2006 was received by the defendants in the afternoon of the same day.

[15] For this first issue, I propose to deal with the approval from KKDN first. The writer of this letter or any other officer from KKDN was not

subpoenaed to give evidence. Instead, it was left to the parties who of course, diverged on their understandings and interpretations of this letter. The letter from KKDN dated 23 January 2006 therefore warrants closer examination and this is what it says:

> PERMOHONAN PENSTRUKTURAN EKUITI SAHAM DAN LEMBAGA PENGARAH
>
> Dengan hormatnya …
>
> 2 Sukacita dimaklumkan bahawa permohonan penstrukturan semula ekuiti saham dan lembaga pengarah syarikat tuan adalah diluluskan. Kedudukan saham syarikat tuan adalah seperti berikut:
>
> (a) Amarjit Singh a/l Kartar Singh (70%)
>
> (b) Sarisah @ Nosilsawati bt Matabin (30%)
>
> 3 Kelulusan ini adalah tertakluk kepada keputusan tapisan keselamatan bagi kedua-dua pemegang saham berkenaan. Keputusan ini akan terbatal sekiranya mana-mana penama di atas gagal dalam tapisan keselamatan yang akan dijalankan.

[16] Having read the letter, there is no doubt in my mind that KKDN has approved the restructuring of the share equity and board of directors of JKL Security Sdn Bhd in the names and proportion of shareholdings as set out in para 2. But, I am also in no doubt that this approval is conditional. At para 3, KKDN unequivocally said that the approval would be revoked in the event any of the named shareholders failed in the security clearance that was to be conducted.

[17] Learned counsel for the defendants submitted that this conditional approval from KKDN is nevertheless 'approval' within the meaning and intent of cl 5.1. With due respect, I do not agree. Upon a true and proper construction of the share sale agreement, it is plain that the parties intended to refer only to unconditional approvals. The provision of a fairly extensive term dealing with adverse terms or conditions imposed in approvals granted at cl 5.3 illustrates this intention. A similar argument was taken up in *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd*, at p 163. It was rejected at first instance and upheld on appeal by the Court of Appeal.

[18] I also do not agree with the submission that the defendants have completed their obligations under cl 5.1(a)(ii) in that the defendants have done all that was required of them under the share sale agreement and that it was now entirely the responsibility of the plaintiff to procure the security clearance. On a proper reading of cl 5.1, I find that the obligation to procure the necessary approvals lies with the defendants. Clause 5.1(a)(ii) plainly provides that the defendants are to 'apply and obtain the relevant approvals'.

In my judgment, it would be fair to say that this obligation would in the facts of this case, include attending to any logistical arrangement in order that the plaintiff may undergo the security clearance required. The requirement under cl 5.1(b) that the defendants submit applications for approvals within 30 days from the date of the agreement further illustrates the awareness that the parties had to the processes involved in procuring the necessary unconditional approvals.

[19] It is therefore my finding that this condition precedent in cl 5.1(a)(ii) has not been fulfilled. In the face of this, it is irrelevant whether the other two conditions precedent have been fulfilled as cl 5.2 clearly intended all three conditions precedent to be satisfied and not just one or two of three conditions precedent. Clause 5.2 states:

> The Conditions Precedent in Clause 5.1 shall be fulfilled only when the Vendors have fulfilled all conditions of the aforesaid approvals within EIGHT (8) months from the date hereof or such extended time thereof as the parties hereto may agree upon.

[20] In any case, there is no evidence before me that the other two conditions precedent have been fulfilled or that there has been a waiver of these approvals as all conditions have to be fulfilled — see clause 5.1(c). At the very least, a copy of the licence or a list of the names of employees ought to have been produced to support the defendants' contentions. But, there was none.

[21] Considering these circumstances, I find the conditions precedent not satisfied. It is my further finding that there was no agreement to an extension of time by the plaintiff to allow the first to third defendants to comply with cl 5.1. This is significant as by cl 14.3, the parties intended time to be of the essence of this agreement and this too is not in dispute. Consistent with this intention, the parties had provided that the conditions precedent had to be fulfilled within eight months from the date of agreement, that is, by 13 January 2006. However, by cl 5.2, that time for performance of the conditions precedent may be extended by agreement of the parties.

[22] Section 40 of the Contracts Act 1950 as submitted by the defendants is a general proposition of law that needs to be read in context together with several other provisions relevant for consideration here, namely ss 32, 36 and 56 of the Contracts Act. In *Chin Kim & Anor v Loh Boon Siew* [1970] 1 MLJ 197, the case cited by the defendants in support of their contention that the plaintiff had acquiesced to the extension of time for performance of the conditions precedent, the Federal Court was there addressing a situation quite different from that presented here. In that case, a deposit was refunded

when the vendor of the sale of a piece of land was unable to give the subject land with vacant possession. The purchaser did nothing after receiving the refund until he filed the writ claiming for specific performance. It was in that context that the Federal Court alluded to s 40 and said 'The vendor's refusal of the deposit … was coupled with an unequivocal repudiation of the agreement. That left two courses open to the purchaser — either to agree to rescission of the agreement or treat the repudiation as 'writ in water'. This is clearly laid down in s 40 of the Contracts (Malay States) Ordinance 1950 …'.

[23] Further along at p 199, the Federal Court examined the facts which led to the conclusion that there was acquiescence or acceptance of the rescission:

> In this case one should have thought that the purchaser would not hesitate to make his position clear one way or the other. Yet he did nothing of the sort. If he disagreed that the vendors were on-titled to repudiate, he had only to say so. Had he been at all desirous of completing the purchase — even without vacant possession — all he had to do was perfectly simple, namely, give notice to the vendors of his intention so to do and tender the whole purchase price. What else were the vendors reasonably to assume by reason of his complete silence except that he acquiesced in their tearing up the agreement? What was the proper inference the court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of four years … is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission.

[24] Contrasting that with the facts in this case, I do not see any evidence or evidence of conduct of the plaintiff which indicates waiver or an extension of time for fulfillment of the conditions precedent by the plaintiff. On the contrary, the plaintiff's conduct is consistent with its intention to maintain time as the essence of the share sale agreement. This is reflected in the plaintiff's letter dated 6 December 2005 where apart from inquiring on the status of the conditions precedent, the plaintiff reminded the defendants of the due date for their compliance under cl 5.1.

[25] There is also the defendants' letter dated 24 January 2006 which I find significant in two ways. By this letter, the defendants, inter alia, sought 'written confirmation as to whether the purchaser is agreeable to grant a further extension of the period for the fulfillment of the Conditions Precedent for another TWO (2) months'. First of all, this letter indicates the defendants' awareness that the conditions precedent had not been fulfilled by the critical date of 13 January 2006 as the approval of KKDN being a conditional approval still required further action on its part. Next, the letter

indicates that with time being of the essence, compliance by 13 January 2006 was absolutely vital. If time was not extended for compliance, the share sale agreement would then be rendered void and liable to termination under cl 5.4. Clause 5.4 of the share sale agreement provides that where the approvals mentioned in cl 5.1 are either refused or are not obtained in time, either of the parties may 'terminate in the manner described in cl 5.3(b)', that is by way of a written notice to the other party notifying of the 'desire to terminate' the agreement. And, this was precisely what the plaintiff did. The first act of the plaintiff after the 13 January 2006 was to send the letter of termination and that accords with its rights as provided in the agreement. Pursuant to cl 5.3(b), the share sale agreement was determined forthwith and became 'null and void and of no effect whatsoever'. In *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* at p 163, the Court of Appeal similarly rejected performance of the condition precedent where the letter of approval from the Foreign Investment Committee (FIC) was not only conditional but 'came after the expiry of the period stipulated in the agreement and thus rendered useless'.

[26] These several clauses in the share sale agreement setting out the position of the rights and interests of the parties are consistent with the position as encapsulated under ss 32 and 36 of the Contracts Act 1950. In *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 the Privy Council laid down the following three principles when dealing with conditional contracts:

(i) Where a conditional contract fixes a date for the completion of the sale, then the condition must be fulfilled by that date;

(ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;

(iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

[27] Applying those principles to the facts of this case, there is no room for suggesting that the conditions precedent may be fulfilled by a time other than the date fixed, that is, 13 January 2006. The compliance requirements are strict on both parties. Until the conditions have been satisfied, there is no sale to be completed and the rights of the parties are suspended in the meantime. As said by the Privy Council in *Aberfoyle Plantations Ltd* at p 50, 'It was thus made plain beyond argument that the condition was a condition precedent

on the fulfillment of which the formation of a binding contract of sale between the parties was made to depend'.

[28] In *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, the Supreme Court had occasion to address the position of a contract where time was not merely of the essence of the contract obtaining certain approvals was a condition precedent of the whole contract. In such a situation, the Supreme Court was of the view that 's 56 of the Contracts Act did not apply and the proper provision should be s 36(1)' which provides that if 'Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time becomes void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible'. Since the event, namely the unconditional approval of KKDN had not been obtained by the deadline of 13 January 2006, by virtue of s 36(1) of the Contracts Act, the share sale agreement became void. It was therefore open to the plaintiff to terminate under cl 5.4.

[29] The plaintiff was therefore perfectly within its rights when it terminated the share sale agreement in the manner that it did and the plaintiff was further entitled to demand a refund of the deposit held. The arguments put forth today in answer to the plaintiff's claim are therefore untenable in light of the contemporaneous evidence from the defendants themselves.

Whether the fourth defendant breached its duties as stakeholders in releasing to the first to third defendants monies that it held as stakeholders

[30] The claim against the fourth defendant is for breach of its duties as stakeholder as seen in paras 18, 19 and 20 of the statement of claim. But, the relevant paragraph is para 18 where the plaintiff alleged that 'Despite full knowledge of the dispute between the parties to the share sale agreement, the fourth defendant, in breach of his stakeholder duties, released the sum of RM130,000 to the first to third defendants'.

[31] The position of a stakeholder was discussed in *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116 and it would be beneficial to remind oneself of that understanding:

> What is in essence stakeholding? The word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in the future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

[32] At p 118, the Supreme Court cited *Potters (a Firm) v Loppert* [1973] 1 All ER 658 where Pennycuick VC said:

> Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

[33] In *FACB Bhd v Ho See Sin & Ors* [2003] 4 CLJ 667 at p 705 Mohd Ghazali Yusoff J (as he then was) when examining a similar issue quoted from *Osborn's Concise Law Dictionary* (8th Ed) the definition of a 'stakeholder' as 'A person with whom money or property (in which he himself claims no interest) is deposited to abide an event, eg, pending the decision of a bet or wager. The term is commonly used in relation to a contract for the sale of land where deposit monies are held by the purchaser's solicitors'. His Lordship also quoted with approval Lord Edmund-Davies's remarks in *Sorrel & Anor v Finch* [1977] AC 728 that 'The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...'.

[34] This view was consistently followed in *Samat Din & Partners v Bank Pembangunan (M) Bhd* [1997] 3 MLJ 542; *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134; *Chen, Leong & Company (sued as Firm) v Sri Naka Jaya Enterprise Sdn Bhd* [2009] MLJU 338; [2009] 6 CLJ 444; and *Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872. In *Selvaratnam Vellupillai v Dr Jayabalan Karrupiah*, although the Federal Court found the redemption sum in question was not a stake and the role of the lawyers in that case was not as stakeholder, the Federal Court observed that 'In a stakeholding in vendor and purchaser cases, the sum in question is a stake held by the stakeholder pending the outcome of a future event, and, according as to what the outcome is, the money then becomes available to either the purchaser or the vendor'.

[35] Therefore, the principles of law at play here are quite clear. The fourth defendant as stakeholder hold the money or deposit on trust for all the parties. He is not the agent of any particular party. He is the agent of all or in this case, both the plaintiff and the first to third defendants. How, what

and when the fourth defendant is to deal with the subject monies is entirely dependent on all the circumstances. Those circumstances logically start with the terms of the share sale agreement. Now, cl 4.1 provides for the manner of payment of the earnest money, the 10% of the deposit and the balance of the purchase price. This is what it says:

> 4.1(b) A further sum of RINGGIT MALAYSIA ONE HUNDRED THIRTY THOUSAND (RM130,000-00) ONLY being TEN per centum (10%) of the Purchase Price to be paid to the Vendor's Solicitors as stakeholders upon execution of this Agreement (hereinafter referred to as 'the balance Deposit' which together with the Earnest Deposit shall hereinafter be collectively referred to as 'the said Deposit') for the onward release to the Vendors upon fulfillment of the Conditions Precedent as hereinafter mentioned in Clause 5.1(a) and (b).

[36] The fourth defendant released the monies to the first to third defendants when it decided that they had fulfilled all the conditions precedent. The monies were released sometime between 28 February 2006 and 30 March 2006. No specific date was adduced at trial. The evidence however reveals that at that time, certainly before 28 February 2006, the fourth defendant was well aware that the matter concerning the fulfillment or otherwise of the conditions precedent by the deadline was very much a contested issue. Both sides were taking diametrically opposing views of the position of the conditions precedent with each side insisting that each was right in their stand. From the letters exchanged, I find the fourth defendant extensively involved in the issue, taking the position that the conditions precedent had been fulfilled and that there was compliance of the terms of the agreement. It is in this aspect that I find the fourth defendant unable to divorce and keep separate its roles and duties as solicitor acting in the interests of his client and, as solicitors acting as stakeholder in the interests of the parties to the share sale agreement. While solicitors are frequently called upon to perform this role as stakeholder and frequently do so without incident, on the facts and circumstances of this case, I am not satisfied that the fourth defendant has not breached its duties as stakeholder.

[37] Further, as a legally qualified person, the solicitors must be well aware of the readily available process of interpleader. It would certainly be the most prudent thing that a stakeholder such as the fourth defendant would have done and expected to have done given the circumstances as presented in this case. In *Samat Din & Partners v Bank Pembangunan (M) Bhd*, the Court of Appeal said at p 545 that '… If numerous claims are made of him in respect of the subject matter of the stakeholding, it is plain where his duty lies. It is for him to apply to the court by way of interpleader proceedings to seek its directions as to what he should do … In my judgment, the appellant cannot resist the first respondent's claim on the ground that Jasudi has not been satisfied or that the second respondent has settled the loan in full. Those

issues are germane in any dispute between the first and second respondents, or between HY and Jasudi'. Although these remarks were made in a case where the issue involved whether a solicitor acting as stakeholder has any claim whatsoever to the subject-matter of the stakeholding, I am of the opinion that the principle holds equally true where the solicitor has no such claim. The need for neutrality is keen and quite necessary since very often in transactions such as that presented in this case; the solicitors of one of the parties will be called upon to act as stakeholder. Stakeholders are not meant and certainly not from the terms as set out in cl 4.1(b) to sit in judgment over contesting claims. On the contrary, the evidence points to intention of the parties that the stakeholder remains neutral. It is the belief that stakeholders will act fairly that lends confidence to such appointment and role in the first place.

[38] In *Annamalai a/l Subramaniam v V Muthusamy & Tan (sued as Firm)* [2000] 7 MLJ 541, Jeffrey Tan J (as he then was) observed that it was not for solicitors who are non-contracting parties to say that the agreement in that case had been terminated. In other words to form a view. The court further said at p 545: 'Also, it was most improper of the defendant, who were solicitors for both vendor and purchasers and so should remain neutral, to take the side of one against the other. Indeed, it was totally wrong of the defendant to take up the cudgel for the purchasers who themselves had not challenged the termination of the agreement, or for the sub-purchasers who themselves had not contracted with the plaintiff, against the plaintiff.'

[39] In answer to a question posed by the plaintiff's counsel, Mr Saranjit as to why he did not agree that where there are rival claims, the rule of prudence is to interplead, Mr Sunny Matthews a/l PT Mathews (DW2) on behalf of the fourth defendant said: 'My clients have satisfied the necessary conditions.' It is plain from this answer that the two roles as solicitor and stakeholder were confused by the fourth defendant at the material time. In looking to 'his client's interests', he has clearly forgotten his other principal, the plaintiff of whose consent he is to obtain and whose interests he is also to safeguard. The determination of whether the conditions precedent have been fulfilled in the facts and circumstances of this case is a matter of construction of this share sale agreement by the courts and not one that the parties have authorised the fourth defendant to decide. From the exchange of correspondence and the evidence adduced, I am satisfied that the plaintiff has proved that the fourth defendant was in breach of its duties as stakeholder when it released the deposit to the first to third defendants.

REMEDIES

[40] The remedies sought are declaratory orders to the effect that:

(a) the first to third defendants have not fulfilled the conditions precedent on or before 13 January 2006;

(b) the plaintiff has lawfully terminated the share sale agreement by the issuance of the notice of termination dated 26 January 2006; and

(c) the fourth defendant had breached their duties as stakeholders by releasing the stakeholder sum of RM130,000 to the first to third defendants.

[41] Further, the plaintiff sought interests on the said sums and general damages to be assessed. In view of my findings, the relief for declaratory orders in the terms as prayed for at paras A, B and C of the statement of claim are hereby allowed together with an order that the defendants be jointly and severally liable to refund to the plaintiff the sum of RM130,000 with interest at 8%pa from 30 March 2006 to the date of settlement. I also award costs of RM25,000 to the plaintiff.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed